LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 18 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 72

BRADLEY REED SMITH, *Petitioner,*

v.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent.*

BRIEF OF

GAY WILSON ALLEN; AARON ASHER; BETTY BALLANTINE (Ballantine Books, Inc.); IAN BALLANTINE (Ballantine Books, Inc.); SHEILA BARRY (Taplinger Publishing Co., Inc.); JACQUES BARZUN; HOWARD K. BAUERNFEIND (J. B. Lippincott Co.); ERIC BENTLEY; LOUISE BOGAN; CHARLES G. BOLTE (The Viking Press, Inc.); EDWARD E. BOOHER (McGraw-Hill Book Co.); WALTER I. BRADBURY (Harper & Brothers); NED BRADFORD (Little, Brown & Co.); GEORGE BRAZILLER (George Braziller, Inc.); GERMAINE BREE; HARVEY BREIT; JOHN MALCOLM BRINNIN; CHARLES R. BYRNE (Macfadden-Bartell Corp.); HERB CAEN (San Francisco Chronicle); ANGUS CAMERON (Alfred A. Knopf, Inc.); MARK CARROLL (Harvard University Press); JOHN CIARDI; HAROLD CLURMAN; EVAN S. CONNELL (Contact); JOHN COURNOS; PASCAL COVICI (The Viking Press, Inc.); EDWARD DE GRAZIA; PATRICK

(Continued on inside of cover)

AS AMICI CURIAE

EDWARD DE GRAZIA
Attorney for Amici Curiae,
1001 Connecticut Ave., N.W.
Washington 6, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

DICKEY; JOHN DOS PASSOS; JAMES W. ELLISON (Holt, Rinehart & Winston, Inc.); RICHARD ELLMAN; JASON EPSTEIN (Random House); LAWRENCE FERLINGHETTI (City Lights Books); JOHN C. FULLER (Saturday Review); BERNARD GEIS (Bernard Geis Associates); MAXWELL GEISMAR; JACK GELBER; EMANUEL GELTMAN (The Fred Praeger of Clarence, Inc.); ARNOLD GINGRICH (Esquire); E. S. GINGER (Hawthorne Books, Inc.); HERBERT GOLD; HARRY GOLDEN; MITCHELL GOODMAN; ROBERT GOTTLIEB (Simon & Schuster, Inc.); HOWARD GREENFELD (The Orion Press, Inc.); JOHN HOWARD GRIFFIN; RICHARD L. GROSSMAN (Grossman Publishers, Inc.); WILLIAM R. HARVEY (New York University Press); HERBERT HAYDEN (Advocate Publishers); HUGH M. HEFNER (Playboy); CHARLES A. H. HEINLE (Chilton Co., Book Division); CECIL HEMLEY (The Noonday Press); JOHN HERSEY; GRANVILLE HICKS; LAWRENCE HILL (Hill & Wang, Inc.); WILLIAM HOGAN (San Francisco Chronicle); TAY HOHOFF (J. B. Lippincott Co.); JOHN CLELLON HOLMES; R. W. HUEBSCH (The Viking Press, Inc.); RICHARD HUETT (Dell Publishing Co., Inc.); FRED JORDAN (Grove Press, Inc.); JACK KEROUAC; CHESTER KERR (Yale University Press); DONALD S. KLOPFER (Random House); HERMAN KOGAN (Chicago Daily News); JAMES LAUGHLIN (New Directions); JOHN T. LAWRENCE (William Morrow & Co., Inc.); SEYMOUR LAWRENCE (Atlantic Monthly Press); REGINA LEBOWITZ (Farrar, Straus & Cudahy, Inc.); FREEMAN LEWIS (Pocket Books, Inc.); R. W. B. LEWIS; ROBERT LOWELL; KENNETH McCORMICK (Doubleday & Co., Inc.); ROBERT M. MACGREGOR (New Directions); CAREY McWILLIAMS (The Nation); NORMAN MAILER; BERNARD MALAMUD; MARYA MANNES; THORPE MENN (Kansas City Star); PETER MICHELSON (Chicago Review); ERIC MOON (Library Journal); FREDERICK MORGAN (Hudson Review); TRUMAN NELSON; ROKE NORRIS (Chicago Sun-Times); NORMAN HOLMES PEARSON; ARTHUR PELL (Liveright Publishing Corp.); BERNARD R. PERRY (Indiana University Press); ROBERT PHELPS (George Braziller, Inc.); SAMUEL H. POST (Belmont Books; LAWRENCE CLARK POWELL; DON RAEBURN (Harbor Press, Inc.); HENRY RAGO (Poetry); THEODOR REIK; ELMER RICE; HAROLD ROBBINS; HENRY ROBBINS (Alfred A. Knopf, Inc.); PAUL H. ROSSMANN (Antioch Review); BARNEY ROSSET (Grove Press, Inc.); HOWARD W. SAMS (The Bobbs-Merrill Co., Inc.); MARK SCHORER; WEBSTER SCHOTT (Kansas City Star); PETER SCHWED (Simon & Schuster, Inc.); WILLIAM R. SCOTT (William R. Scott, Inc.); EDWIN SEAVER (George Braziller, Inc.); RICHARD SEAVER (Grove Press, Inc.); ROD SERLING; KARL SHAPIRO; LEONARD SHATKIN (The Crowell-Collier Publishing Co.); WILLIAM L. SHIRER; JAMES H. SILBERMAN (The Dial Press, Inc.); LYLE STUART; WILLIAM STYRON; AARON SUSSMAN (Sussman & Sugar, Inc.); ALAN SWALLOW (Alan Swallow, Publisher); RICHARD TAPLINGER (Taplinger Publishing Co., Inc.); LIONEL TRILLING; ARTHUR W. WANG (Hill & Wang); HOWARD SAYRE WEAVER (Yale University Press); RICHARD WILBUR; DONALD WOLLHEIM (Ace Books, Inc.); W. A. WOOD (University of Chicago Press); THOMAS YOSELOFF (Thomas Yoseloff, Inc.); HARRY ASHMORE (Encyclopedia Britannica); MAX LERNER; THEODORE O'LEARY (Kansas City Star).

INDEX

	Page
Interest of Amici Curiae and Preliminary Statement	2
Argument	3
Conclusion	13

CITATIONS

CASES:

Alberts v. California, 354 U. S. 476	4
Attorney General v. Book Named "Tropic of Cancer", 184 N. E. 2d 328	13
Butler v. Michigan, 352 U. S. 380	4
Doubleday v. New York, 335 U. S. 848	3
Kingsley Books, Inc. v. Brown, 354 U. S. 436	4
Manual Enterprises v. Day, 370 U. S. 478	4, 8, 10
Roth v. United States, 354 U. S. 476	2, 4, 7, 8, 10
Smith v. California, 361 U. S. 147	4, 12

CONSTITUTION:

First Amendment	12
Fourteenth Amendment	12

MISCELLANEOUS:

American Book Publishers Council, Censorship and Freedom to Read Bulletins	10
American Civil Liberties Union, Statement on Obscenity Censorship	9
American Law Institute, Model Panel Code (Proposed Official Draft) § 251	9
American Library Association, Intellectual Freedom Bulletin	10
Blanshard, The Right to Read (1955)	7
Chafee, Government and Mass Communications (1947)	5
Conant, Address to the Modern Language Association (1940)	6
Conford, The Origin of Attic Comedy (1961)	7
Crosskey, Politics and the Constitution (1953)	12

	Page
de Grazia, Obscenity and the Mail, 20 Law & Contemp. 615 (1955)	7
Dewey, Freedom and Culture (1939)	5
Dewey, The Public and Its Problems (1946)	5, 6
Downs, The First Freedom; Liberty and Justice in the World of Books and Reading (1960)	7
Ehrlich, Howl of the Censor (1961)	7
Fowlie, Age of Surrealism (1950)	8
Freud, Gesammelte Schriften (1940-52)	5, 6
Goodman, Pornography, Art & Censorship, Commentary (March, 1961)	5, 7
Haight, Banned Books (1955)	7
Jones, The Life and Work of Sigmund Freud (1957)	5, 6
Kallen, The Ethical Aspects of Censorship, Social meaning of Legal Concepts No. 5 (1953)	5
Kalven, The Metaphysics of the Law of Obscenity, The Supreme Court Review (1960)	3
Kaplan, Obscenity as an Esthetic Category, 20 Law & Contemp. 556 (1955)	5, 7
Lockhart & McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 19 (1960)	4, 12
Lockhart & McClure, Literature, The Law of Obscenity and the Constitution, 38 Minn. L. Rev. 295 (1954)	5, 7
Los Angeles Times, August 24, 1962	10
McKeon, Merton & Gelhorn, The Freedom to Read (1957)	5
Meiklejohn, The First Amendment is an Absolute, Supreme Court Review (1961)	5
National Council of Teachers of English, The Students' Right to Read (1962)	6, 9
New York Herald Tribune Book Section, April 29, 1962	11
New York Times, August 27, 1961 through December 3, 1961	11
New York Times Book Review, January 21, 1962	11
Orwell, Inside the White Whale and Other Essays (1940)	8
Wilson, Twilight of the Expatriates, The Shores of Light (1952)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 812

BRADLEY REED SMITH, *Petitioner,*

v.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent.*

BRIEF OF

GAY WILSON ALLEN; AARON ASHER; BETTY BALLANTINE (Ballantine Books, Inc.); IAN BALLANTINE (Ballantine Books, Inc.); SHEILA BARRY (Taplinger Publishing Co., Inc.); JACQUES BARZUN; HOWARD K. BAUERNFEIND (J. B. Lippincott Co.); ERIC BENTLEY; LOUISE BOGAN; CHARLES G. BOLTE (The Viking Press, Inc.); EDWARD E. BOOHER (McGraw-Hill Book Co.); WALTER I. BRADBURY (Harper & Brothers); NED BRADFORD (Little, Brown & Co.); GEORGE BRAZILLER (George Braziller, Inc.); GERMAINE BREE; HARVEY BREIT; JOHN MALCOLM BRINNIN; CHARLES R. BYRNE (Macfadden-Bartell Corp.); HERB CAEN (San Francisco Chronicle); ANGUS CAMERON (Alred A. Knopf, Inc.); MARK CARROLL (Harvard University Press); JOHN CIARDI; HAROLD CLURMAN; EVAN S. CONNELL (Contact); JOHN COURNOS; PASCAL COVICI (The Viking Press, Inc.); EDWARD DE GRAZIA; PATRICK DENNIS; JOHN DOS PASSOS; JAMES W. ELLISON (Holt, Rinehart & Winston, Inc.); RICHARD ELLMAN; JASON EPSTEIN (Random House); LAWRENCE FERLINGHETTI (City Lights Books); JOHN G. FULLER (Saturday Review); BERNARD GEIS (Bernard Geis Associates); MAXWELL GEISMAR; JACK GELBER; EMANUEL GELTMAN (The Free Press of Glencoe, Inc.); ARNOLD GINGRICH (Esquire); K. S. GINIGER (Hawthorne Books, Inc.); HERBERT GOLD; HARRY GOLDEN; MITCHELL GOODMAN; ROBERT GOTTLIEB (Simon & Schuster, Inc.); HOWARD GREENFELD (The Orion Press, Inc.); JOHN HOWARD GRIFFIN; RICHARD L. GROSSMAN (Grossman Publishers, Inc.); WILLIAM B. HARVEY (New York University Press); HIRAM HAYDN (Atheneum Publishers); HUGH M. HEFNER (Playboy); CHARLES A. S. HEINLE (Chilton Co., Book Division); CECIL HEMLEY (The Noonday Press); JOHN HERSEY; GRANVILLE HICKS; LAWRENCE HILL (Hill & Wang, Inc.); WILLIAM HOGAN (San Francisco Chronicle); TAY HOHOFF (J. B. Lippincott Co.); JOHN CLELLON HOLMES; B. W. HUEBSCH (The Viking Press, Inc.); RICHARD HUETT (Dell Publishing Co., Inc.); FRED JORDAN (Grove Press, Inc.); JACK KEROUAC; CHESTER KERR (Yale University Press); DONALD S. KLOPFER (Random House); HERMAN

KOGAN (Chicago Daily News); JAMES LAUGHLIN(New Directions); JOHN T. LAWRENCE (William Morrow & Co., Inc.); SEYMOUR LAWRENCE (Atlantic Monthly Press); REGINA LEBOWITZ (Farrar, Straus & Cudahy, Inc.); FREEMAN LEWIS (Pocket Books, Inc.); R. W. B. LEWIS; ROBERT LOWELL; KENNETH McCORMICK (Doubleday & Co., Inc.); ROBERT M. MACGREGOR (New Directions); CAREY McWILLIAMS (The Nation); NORMAN MAILER; BERNARD MALAMUD; MARYA MANNES; THORPE MENN (Kansas City Star); PETER MICHELSON (Chicago Review); ERIC MOON (Library Journal); FREDERICK MORGAN (Hudson Review); TRUMAN NELSON; HOKE NORRIS (Chicago Sun-Times); NORMAN HOLMES PEARSON; ARTHUR PELL (Liveright Publishing Corp.); BERNARD B. PERRY (Indiana University Press); ROBERT PHELPS (George Braziller, Inc.); SAMUEL H. POST (Belmont Books; LAWRENCE CLARKE POWELL; BEN RAEBURN (Horizon Press, Inc.); HENRY RAGO (Poetry); THEODOR REIK; ELMER RICE; HAROLD ROBBINS; HENRY ROBBINS (Alfred A. Knopf, Inc.); PAUL H. ROHMANN (Antioch Review); BARNEY ROSSET (Grove Press, Inc.); HOWARD W. SAMS (The Bobbs-Merrill Co., Inc.); MARK SCHORER; WEBSTER SCHOTT (Kansas City Star); PETER SCHWED (Simon & Schuster, Inc.); WILLIAM R. SCOTT (William R. Scott, Inc.); EDWIN SEAVER (George Braziller, Inc.); RICHARD SEAVER (Grove Press, Inc.); ROD SERLING; KARL SHAPIRO; LEONARD SHATZKIN (The Crowell-Collier Publishing Co.); WILLIAM L. SHIRER; JAMES H. SILBERMAN (The Dial Press, Inc.); LYLE STUART; WILLIAM STYRON; AARON SUSSMAN (Sussman & Sugar, Inc.); ALAN SWALLOW (Alan Swallow, Publisher); RICHARD TAPLINGER (Taplinger Publishing Co., Inc.); LIONEL TRILLING; ARTHUR W. WANG (Hill & Wang); HOWARD SAYRE WEAVER (Yale University Press); RICHARD WILBUR; DONALD WOLLHEIM (Ace Books, Inc.); W. A. WOOD (University of Chicago Press); THOMAS YOSELOFF (Thomas Yoseloff, Inc.); HARRY ASHMORE (Encyclopedia Britannica); MAX LERNER; THEODORE O'LEARY (Kansas City Star).

AS AMICI CURIAE

INTEREST OF AMICI CURIAE AND PRELIMINARY STATEMENT

This brief is submitted, with the consent of the parties, on behalf of the more than one hundred authors, editors and publishers named.

We understand the Constitutional guaranties of freedom of expression forbid a State to suppress the public circulation of any work expressing ideas which may have the slightest social importance, *Roth* v. *United States*, 354 U. S. 476. We believe this must hold true even if some, many, or most persons cannot find this importance. We believe this must hold true

even if a jury or judge cannot find this importance. And we believe a work which has literary or artistic importance cannot be deemed to be empty of social importance.

Accordingly, we believe the action of the Superior Court of the State of California for the County of Los Angeles, in upholding the conviction of Mr. Bradley Reed Smith for possessing and distributing Henry Miller's *Tropic of Cancer* was in violation of the protection afforded by the Constitutional guaranties. We further believe this case presents questions of utmost gravity for the Constitutional freedom of American writers, artists, booksellers, book publishers, and the American reading public.

ARGUMENT

I

This appears to be the first time in fourteen years[1] that this Court has had an opportunity squarely to examine a "typical" obscenity prosecution in a situation

---

[1] In *Doubleday* v. *New York*, 335 U. S. 848 (1948), a bench of this Court divided equally over the conviction of a publisher distributing Edmund Wilson's "*Memoirs of Hecate County.*" In noting a distinction between material such as "*Memoirs of Hecate County*", "*Tropic of Cancer*", and "*The Devil Rides Outside*" on the one hand, and material of the kind indicated in notes 2 and 3 *infra* on the other, *amici* are not to be misunderstood as implying that the suppression of the latter or the punishment of its distributors, was or would be constitutional. The intent is solely to point up how, in terms of the Court's opinion in *Roth*, the issues framed by Petitioner's conviction differ from those framed by the contrasted cases in which the Court had before it material whose literary (or other) importance could apparently be ignored. As Professor Harry Kalven has analysed *Roth*, "(Obscenity) is banned not because it is dangerous but because it is worthless." The Metaphysics of the Law of Obscenity, *The Supreme Court Review* (1960) at 15.

involving a work whose literary and artistic importance cannot be ignored. In *Roth* v. *United States, supra,* and *Alberts* v. *California,* 354 U. S. 476, as in *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478, the material which formed the basis for the federal and state prosecutions and the federal administrative exercise of restraint apparently raised no such claim to importance.[2] In *Smith* v. *California,* 361 U. S. 147, and in *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436, the material forming the basis for the State prosecution and exercise of restraint also apparently raised no such claim to importance.[3] In *Butler* v. *Michigan,* 352 U. S. 380, a work raising some claim to importance was brought before this Court,[4] but there the Court's deliberations were focused on a special statute designed to protect children, but unconstitutionally operating to restrain the reading of adults.

The case at hand, like *Roth, Alberts* and *Smith,* involves a typical criminal obscenity statute. But unlike *Roth, Alberts* and *Smith,* this case presents, and for the first time apparently since *Doubleday* v. *New York,* 335 U. S. 848, the issue of whether a work

---

[2] In *Roth,* the only material which might have raised such claim (*"American Aphrodite"*) was eliminated from consideration by the terms of the Court's grant of the writ of *certiorari.* In *Alberts,* bizarre photographs were largely involved, and the constitutionality of the statute as applied to this material was not questioned. See Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 Minn. L. Rev. 5, 19-26 (1960). In *Manual Enterprises,* photographic magazines "beamed at homosexuals" were involved.

[3] In *Smith,* the material was *"Sweeter Than Life"*; In *Kingsley Books,* *"Nights of Horror"*. See Lockhart & McClure, op. cit. *supra* note 2 at 29, 43.

[4] *"The Devil Rides Outside"* by Alfred Butler.

making any claim to importance may be suppressed by such a statute—consistently with the Constitutional guaranties of free expression.

II

We urge the Court to grant recognition to the importance of literature and art in the development of a free market place of ideas. "The framers of the First Amendment must have had literature and the arts in mind." Chafee, *Government and Mass Communications* (1947) at 53. It does not seem open to question but that works of "fiction" and "art" may contribute as much to the interplay of competing ideas and the development of public information and learning as works conveying "news," "truth" or "history". To ban a novel of importance may as seriously impede the desirable public circulation of ideas as to ban a news journal of importance. It seems superfluous to recite more than the following, from among the findings of cognizant authorities,[5] to substantiate this proposition. The distinguished American philosopher and educator, Professor John Dewey, reported:

---

[5] Dewey, *The Public and Its Problems* (1946), especially pages 163, 183-184; Dewey, *Freedom and Culture* (1939), especially pages 9-10; Freud, *Gesammelte Schriften* (1940-1952), Vol. I, 227, Vol. VII, 33, 70, Vol. XIV, 399, 495, quoted in Jones, *The Life and Work of Sigmund Freud*, Vol. III, 418-420 (1957). McKeon, Merton & Gelhorn, *The Freedom to Read* (1957); Lockhart & McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 368-373 (1954); Kaplan, *Obscenity As An Esthetic Category*, 20 Law & Contemp. 556-559 (1955); Goodman, "Pornography, Art & Censorship" in *Commentary* (March, 1961) at 203-212; Meiklejohn, "The First Amendment is an Absolute" in *The Supreme Court Review* (1961) at 245, 257, 262-263; Kallen, "The Ethical Aspects of Censorship" in *Social Meaning of Legal Concepts* No. 5, N.Y.U. School of Law (1953) at 34-71.

> "The freeing of the artist in literary presentation . . . is as much a precondition of the desirable creation of adequate opinion on public matters as is the freeing of social inquiry . . . . Artists have always been the real purveyors of news, for it is not the outward happening in itself which is news, but the kindling by it of emotion, perception and appreciation."[6]

The founder of the modern psychological science, Dr. Sigmund Freud, observed:

> "Imaginative writers are valuable colleagues and their testimony is to be rated very highly . . . because they draw on sources that we have not yet made accessible to science . . . . The portrayal of the psychic life of human beings is, of course, (the imaginative writer's) most special domain; he has always been the forerunner of science, and thus scientific psychology too."[7]

It is also evident that the largest single threat of interference with literary and artistic expression, arises out of actions taken under color of state and federal

---

[6] *The Public and Its Problems* (1946) at 9-10. Compare the words of President James B. Conant, Harvard University, in an address to the Modern Language Association of America (1940): "It seems to me unlikely that a future citizen of a free country can be developed by education, in these days . . . without the devout study of great literature. Such study is probably essential because for many people a sense of values must be felt, not proved by argumentation. For these people, it seems to me, not philosophy but poetry—using the word in its widest sense—poetry alone can first open the doors of discrimination." Quoted in "The Students Right to Read" of the National Council of Teachers of English (1962), at 7.

[7] *Gesammelte Werke* (1940-52) Vol. VII at 33, 70; quoted in Jones, *The Life and Work of Sigmund Freud*, Vol. III at 419 (1957).

obscenity statutes.[8] There is no need to explore the deep-seated connections between sex, religion, literature and art[9] to appreciate why the sexual aspects have been responsible for by far the greater part of all censorship of literature and art; it should be enough to review the catalogues of important works suppressed for this reason in the past, and the role played by government in that suppression.[10]

Until the sexual aspect is free of governmental surveillance, neither literature nor art can in this country be wholly free, nor the people's right to read be full-formed.

It may not be sufficient, we fear, simply to lay "obscenity" on one side of the border of constitutional protection, and "literature" and "art" on the other, just as it was apparently not quite sufficient for this Court to lay "material expressing ideas having even the slightest social importance" on the protected side and "obscenity" on the other, *Roth* v. *United States*, *supra*. For there can be no effective freedom for literature and art so long as constitutional protection may be withdrawn by a jury or judge capable of finding its

---

[8] Downs, *The First Freedom; Liberty and Justice in the World of Books and Reading* (1960); Lockhart & McClure, *Literature, The Law of Obscenity and the Constitution*, *supra* note 2 at 372-373.

[9] But see, as illustrative, Cornford, *The Origin of Attic Comedy* (1961); Kaplan, *Obscenity as an Esthetic Category* in "Obscenity and the Arts", 20 Law & Contemp. 544 (1955); Goodman, *Pornography, Art & Censorship*, in *Commentary* (March, 1961) at 203-212.

[10] Ehrlich, *Howl of the Censor* (1961); Haight, *Banned Books* (1955); Blanshard, *The Right to Read* (1955); Lockhart & McClure, op. cit. *supra* note 8 at 334-374; deGrazia; *Obscenity and the Mail*, 20 Law & Contemp. 615 (1955).

prurient interests aroused (*Roth* v. *United States*, *supra*) and its sense of decency offended, (*Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478), by this page or that, perhaps even by a work as a whole, but incapable of finding an importance which may permeate the challenged work.[11]

III

We are mindful the case at hand presents a situation where "experts" appeared before the jury and disagreed about the importance to be assigned *Tropic of Cancer* and its capacity to appeal to prurient interests. We feel this disagreement helps point up the threat to freedom of expression imbedded in criminal proceedings against possessors or distributors of literature or art. For, while on the one hand, it cannot be doubted that *Tropic of Cancer* has importance for many, yet on the other hand, there are those persons, even experts, who would deny its importance and urge that the work be suppressed. But we fail to understand how literary or artistic expression can be required to abide by any consensus—whether public, expert, or jural—if it is to be free and protected by the Constitutional guaranty. However well constituted the jury system may be to weigh questions of appreciable fact, it does not seem

[11] Compare the Superior Court's description of *Tropic of Cancer's* "importance" with those, for examples, of: poets Anais Nin and Karl Shapiro in the Preface and Introduction, respectively, to *Tropic of Cancer;* critics Edmund Wilson in Twilight of the Expatriates", written in 1938 and reprinted in *The Shores of Light* (1952) at 705-08, Wallace Fowlie in *Age of Surrealism* (1950) at 184-185, and George Orwell in *Inside the White Whale and Other Essays* (London, 1940) at 131-146, 176, 184; reviewers Dorothy Parker, Eric Moon, Ben Ray Redman, Harry T. Moore and Terry Southern in Appendix I of the *Petition for Writ of Certiorari*, herein.

fit to measure the freedom needed for literature or art to fulfill its important, sometimes revolutionary functions, nor to decide what license the community may have to read.[12]

We may join those who deplore material calculated to pander to prurient interests,[13] and yet appreciate the foolishness of sacrificing freedom of literary and artistic expression on the altar of the variable sensibilities of the average man. If no formula for discouraging the pandering without maintaining a threat to the freedom can be found by this Court, a serious question arises whether the Constitution does not compel the abandonment of all typical obscenity laws, as applied to adults.[14]

---

[12] "The right of any individual to read is basic to democratic society. This right is based on the only tenable assumption for democratic living: that the educated free man possesses the powers of discrimination and is to be entrusted with the determination of his own actions. The right to read, like all rights embedded in our constitutional traditions, can be used wisely or foolishly. In many ways education is an effort to improve the quality of the choices which are the exercise of this right. But to deny the opportunity of choice in the fear that it may be unwisely used is to destroy the freedom itself. For this reason, we respect the right of individuals to be selective in their own reading and of individuals and groups to express their views for the guidance of others. But for the same reason, we oppose efforts by individuals or groups to limit the freedom of choice of others or to impose their own standards or tastes upon a community at large." National Council of Teachers of English, "The Students' Right To Read" (1962) at 8.

[13] See American Law Institute *Model Penal Code*, Proposed Official Draft (May 4, 1962), § 251.

[14] Compare the Statement of Policy issued by the *American Civil Liberties Union* May 28, 1962, following a three-year review of censorship of allegedly obscene material, suggesting "limitations of expression on the ground of obscenity are unconstitutional", at least in the absence of clear proof the material would cause

But we believe some such formula may be found, that the *Roth/Manual Enterprises* test can be further amplified in such a way as effectively to free American literary and artistic expression from the debilitating restraints imposed by state and federal prosecutions, and the special group pressures which generate them. We respectfully urge this Court to clarify the test's applicability to literary and artistic works, for the *Roth/Manual Enterprises* formula has not discouraged their censorship.[15]

IV

Since *Roth*, over fifty proceedings, or challenges to proceedings, designed to remove *Tropic of Cancer* from public book stores and libraries have been instituted, under color of typical State laws and municipal ordinances,[16] despite the decision of federal authorities

---

"in a normal adult, behavior which has validly been made criminal by statute," or where the target group of allegedly obscene material is children and its effect would lead to behavior violative of a criminal statute; cited in the *Newsletter on Intellectual Freedom* of the American Library Association, XI, No. 3 (October, 1962) at 21.

[15] See the many incidents currently reported in the *Newsletter on Intellectual Freedom* of the American Library Association and in the *Censorship Bulletin* and *Freedom To Read Bulletin* of the American Book Publishers Council.

[16] See the library and bookstore cases reported in the *Newsletter on Intellectual Freedom* of the American Library Association, Vol. 10, No. 4 (January, 1962), Vol. 11, No. 1 (April, 1962), Vol. 11, No. 2 (July, 1962), Vol. 11, No. 3 (October, 1962), Vol. 11, No. 4 (December, 1962), Vol. 12, No. 1 (January, 1963). A review of libraries obliged to remove the book and those which successfully resisted pressures to remove it is set forth in Vol. 11, No. 1 (April, 1962). The Los Angeles City Library removed *Tropic of Cancer* following Petitioner's conviction, but announced it would carry *Tropic of Capricorn*, at least until threatened with suit by Respondent. See *Los Angeles Times* for Aug. 24, 1962.

(following *Roth*) not to interfere with the book's circulation.[17] Many of these controversies still pend in state courts where booksellers wait in jeopardy of fines or imprisonments, while in each area affected by the pertinent court's jurisdiction, the book is being effectively suppressed.[18]

On the other hand, more than one million copies of the book have been distributed through the mails and over the counters of bookstores and libraries throughout the land.[19] Although we would not adduce such "best-seller" popularity as a *necessary* criterion of a work's social importance, it seems to us unquestionably *sufficient*.

In our view, it is constitutionally impermissible that a bookseller in one county or one state may successfully be prosecuted for selling a book which booksellers in

---

[17] See Appendices E and F of *Petition For Writ of Certiorari*, herein.

[18] Op. cits. *supra* note 16. See also *N.Y. Times Book Review*, "The Most Recent Troubles of Tropic" by Anthony Lewis at 4 (Jan. 21, 1962). There apparently were twenty-seven arrests alone in five counties of New Jersey. Other cities and counties include: Brooklyn, N.Y.; Rochester, N.Y.; Syracuse, N.Y.; Buffalo, N.Y.; Lorain, Ohio; Cuyabroga Falls, Ohio; Mahoning County, Ohio; Athens, Ohio; Youngstown, Ohio; Sumit County, Ohio; Minneapolis, Minn.; Milwaukee, Wisc.; Marion County, Ind.; Chicago, Ill.; Lake County, Ill.; Denver, Colo.; Chattanooga, Tenn.; Hartford, Conn.; Dade County, Fla.; Duval County, Fla.; Marin County, Calif.; La Jolla, Calif.; Dallas, Texas; Houston, Texas; San Antonio, Texas; Louisville, Ky.; Hartford County, Conn.; Philadelphia, Pa.; Wilmington, Del.; Seattle, Wash.; Indianapolis, Ind.; St. Louis, Mo.; Oklahoma City, Okla.; Birmingham, Ala.; Des Moines, Iowa.

[19] By April, 1962, some 1,100,000 copies had been sold. See *N.Y. Herald Tribune Book Section*, April 29, 1962, at page 3. As of January, 1962, some 2,500,000 copies were in print. See *N.Y. Times Book Review*, op. cit. *supra* note 18 at 4. The work appeared on the *N.Y. Times* national best-seller lists from August 27, 1961 through December 3, 1961.

other counties and states may freely sell,[20] under virtually identical statutory prohibitions. In our view, the Constitutional blanket of protection of expression must be uniform, and the Constitutional freedom to read, equal.[21] Whatever right the states may have to exercise their police powers disparately must expire before a crazy-quilt is made of the First Amendment guaranty.

We understand the Superior Court of California, after upholding petitioner's conviction, nevertheless certified for higher court consideration, certain "important questions of law" which it felt "should be answered", to wit:

> "1. Is the book, 'Tropic of Cancer' obscene?
>
> "2. If the book has literary merit does that alone give it redeeming social importance which takes it out of the class of being obscene?"[22]

---

[20] While Petitioner herein was convicted, booksellers in La Jolla and Marin County, California were acquitted. Booksellers in the counties and states unaffected by the proceedings mentioned *supra* note 18, freely sell the book.

[21] As indicated *supra* note 18 and in the text thereto, persons in some counties and states are being denied access to the book whereas persons in others are not. If freedom to read is a right protected by the First Amendment (Cf. *Smith* v. *California*, 361 U.S. 147, 153) it is a right of all citizens irrespective of the state in which they reside; the states are forbidden uniformly from abridging it, as they are forbidden from abridging their citizens' right to assemble or petition—by operation of the "privileges and immunities" clause, if not the "due process" clause of the Fourteenth Amendment. See Crosskey, *Politics and the Constitution*, II at 1094-5 (1953). Cf. Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, *supra* note 2 at 110-14.

[22] See Appendix B of the *Petition For Writ of Certiorari* herein: Order Certifying Cause To District Court of Appeal, October 24, 1962.

We believe these questions to have great portent for the American public's right to read, and for the future of American literature and art. We urge that both questions be considered by the Court. Once considered, we are sure the sound application of Constitutional principles will require the first to be answered "no", the second to be answered "yes". These were the answers recently given by the highest State court yet to rule on *Tropic of Cancer*, a court no stranger to obscenity censorship—The Supreme Judicial Court of the Commonwealth of Massachusetts. *Attorney General* v. *Book Named "Tropic of Cancer"*, 184 N.E. 2d 328. That Court rested its decision: "squarely on the First Amendment".

CONCLUSION

We respectfully urge this Court to issue a writ of certiorari.

Respectfully submitted,

EDWARD DE GRAZIA
Attorney for Amici Curiae,
1001 Connecticut Ave., N.W.
Washington 6, D. C.